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No. 85-1581 (12)

In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD SOLORIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the offense charged against petitioner—sexual assault on the dependent children of fellow servicemen—is sufficiently "service connected" to authorize a prosecution in the military courts.

2. Whether petitioner's court-martial violated the Due Process Clause because petitioner was denied fair warning that he was subject to prosecution in the military system.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-17a) is reported at 21 M.J. 251. The opinion of the Coast Guard Court of Military Review (Pet. App. 18a-42a) is reported at 21 M.J. 512.

JURISDICTION

The judgment of the Court of Military Appeals was entered on January 27, 1986. The petition for a writ of certiorari was filed on March 26, 1986, and was granted on June 16, 1986. The jurisdiction of this Court rests on 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

1. From October 1980 to June 1984, petitioner, a petty officer on active duty in the Coast Guard, served on the staff of the Commander of the Seventeenth Coast Guard

District in Juneau, Alaska (J.A. 47-50). There is no "base" or "enclave" where Coast Guard personnel live and work in Juneau, and virtually all Coast Guard military personnel reside in the civilian community (Pet. App. 20a-21a n.1). Petitioner lived in a privately owned home (*id.* at 20a). His next door neighbor until June 1983 was Larry Johnson, a Coast Guard enlisted man with a young daughter who turned ten years old in March 1982 (J.A. 53, 102-104). Living nearby was another Coast Guard petty officer, Frank Grantz, who also had a young daughter the same age (*id.* at 51, 120-121). The girls' fathers were assigned to the same command as petitioner and worked in the same building (*id.* at 102-104, 120-121). The two young girls frequently visited petitioner's house (*id.* at 51-55, 106). During those visits, petitioner committed numerous acts of sexual abuse, including fondling, indecent assault, and several attempted rapes of one of the girls. This pattern of abuse continued over a two-year period, while the girls were between ten and 12 years of age, until petitioner was reassigned to the Coast Guard base at Governors Island, New York (Pet. App. 20a-22a).

Following petitioner's transfer, he sexually abused the young daughters of two other fellow Coast Guardsmen in government quarters on the base (Pet. App. 22a). The Alaska crimes first came to light during the investigation of those offenses (Pet. App. 21a; J.A. 107, 123). The State of Alaska was contacted to determine whether it intended to prosecute petitioner for those crimes. The district attorney's office in Juneau responded that the State would defer prosecution to the Coast Guard, for several reasons: because petitioner and his victims were connected to the Coast Guard, because they had been transferred from Alaska, because the crimes had been investigated by Coast Guard personnel, and because similar military charges were pending in New York (Br. in Opp. App. 1a-3a).

2. The Governors Island commander thereafter convened a general court-martial. Petitioner was charged

with 21 specifications of sexual child abuse in Alaska and New York, in violation of Articles 80, 128, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 928, and 934. Before trial, petitioner moved to dismiss the 14 Alaska charges on the ground that the court lacked jurisdiction because the offenses were not "service connected" under this Court's decisions in *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), and *Relford* v. *Commandant*, 401 U.S. 355 (1971) (J.A. 16).

Prior to trial, the court-martial judge conducted an evidentiary hearing on the motion. During the hearing, the government introduced evidence of the damaging effect of the crimes on the young girls who were abused (J.A. 112, 119, 123-125). In addition, the victims' fathers testified about the personal impact of the crimes on them. The evidence showed that the fathers were emotionally shaken; they could not concentrate on their work; and they lost their trust of fellow Coast Guardsmen. As a result of the crimes, the performance by these otherwise superior servicemen deteriorated significantly (*id.* at 108-109, 112, 124-127). The testimony concerning the emotional effect of the crimes on the victims and their families was supported by expert opinion (*id.* at 135-140). The young girls and their servicemen parents required extensive psychological counseling, the costs of which imposed a financial burden on their families (*id.* at 49-50, 107-108, 112, 124-125). Evidence was also adduced concerning the Coast Guard's good reputation in Juneau and the resulting benefits, including job opportunities, that Coast Guard family members enjoy in that community (*id.* at 80-81, 88, 96-97). Testimony was presented that public awareness of petitioner's crimes would have an adverse effect on that reputation, at least in the short run, risking the loss of benefits presently enjoyed by Coast Guard personnel in Juneau (*id.* at 82, 93, 97, 101).

After hearing the evidence, the trial judge granted the motion to dismiss. He concluded that the Alaska offenses

were not sufficiently "service connected" to be triable in the military criminal justice system (J.A. 195-200; see also Pet. App. 62a-63a).

3. The government appealed the dismissal of charges to the Coast Guard Court of Military Review, which reversed the trial judge's ruling and reinstated the Alaska charges (Pet. App. 18a-42a). The court found that several of the trial judge's findings were unsupported by the evidence and were erroneous as a matter of law (*id.* at 28a-35a).[1] The court also found that the trial judge had "overlooked the possible unique and distinct effect" on the military of the inability to court-martial a serviceman for the offenses charged against petitioner (*id.* at 33a-34a). The court concluded that "as a matter of law the Coast Guard's interest in deterring these offenses is distinct from and greater than that of the Alaskan authorities" (*id.* at 33a). Relying on the letter from the Alaska district attorney's office, the court found that the civilian authorities had a diminished interest in prosecuting petitioner, since he and the victims had moved away from the state (*id.* at 34a-35a).

In determining whether the crimes were service connected, the court relied primarily on two criteria articulated in *Relford* v. *Commandant*, *supra*: the responsibility of a military commander to maintain order in his command, and the need for court-martial jurisdiction when civilian courts have a reduced incentive or ability to vindicate that authority (Pet. App. 36a-38a). See 401 U.S. at 367-368. The court concluded that petitioner's offenses "by their very nature contained within them the potential for a disrupting effect on good order and discipline" (Pet. App. 32a) and "directly impacted upon good order, discipline, morale and welfare of servicemembers and their families" (*id.* at 33a). The

[1] Petitioner often refers to the trial judge's findings (Br. 3, 10, 14, 23-24, 26-32), but he fails to note that the court of military review found that several were incorrect as a matter of law (Pet. App. 32a-35a).

court also found that, although the offenses were not committed within the confines of a military base, they were nonetheless "violations against persons associated with one particular Coast Guard command" (*id.* at 35a). It was appropriate, the court held, for the military to be concerned with the security of personnel who make up a command, even when the members of the command do not live and work on a discrete military installation (*ibid.*). The court emphasized that the similarity between the Alaska and New York offenses "presents a pattern of behavior which poses a real threat to families" in the vicinity of the New York Coast Guard facility (*id.* at 36a-37a), and that the commander of that facility had a "compelling" interest in resolving all the charges against petitioner swiftly (*id.* at 37a). The "paramount interest of the Coast Guard" was evidenced by the fact that all the parties were still members of "the Coast Guard community" (*id.* at 37a-38a). Accordingly, the court held that the Alaska child abuse charges were "service connected" under *O'Callahan* and *Relford*.

4. Petitioner thereafter sought review by the Court of Military Appeals. After granting review, that court also concluded that the Alaska offenses were service connected (Pet. App. 1a-17a). The Court of Military Appeals noted that not every off-base offense against a servicemember's dependent is necessarily service connected (*id.* at 12a), but it found that these crimes were sufficiently service connected to justify prosecution by court-martial, since "sex offenses against young children * * * have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned" (*ibid.*). In so ruling, the Court of Military Appeals relied on a number of factors (*id.* at 10a-16a): the emotional and financial impact on the servicemember fathers and the victims; the effect on the morale and discipline of the military unit, both where the parties were stationed when the offenses occurred, and where the

parties might thereafter serve; the reduced interest of civilian authorities in prosecution due to the transfer of the victims and petitioner from Alaska; and the benefits to petitioner, the victims, and the Coast Guard from trying the Alaska off-base and New York on-base offenses together. The court therefore held that petitioner could be court-martialed on the Alaska child abuse charges (*id.* at 16a).[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces" (Art. I, § 8, Cl. 14). That authority includes the power to define crimes and to set their punishments. *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 246 (1960). The Grand Jury Clause of the Fifth Amendment also expressly excepts "cases arising in the land or naval forces" from its terms. More than a century ago, this Court held that Congress may provide for the court-martial of servicemembers for crimes, and that neither the Fifth Amendment right to indictment by a grand jury nor the Sixth Amendment right to trial by a petit jury is applicable when a crime arises in the land or naval forces. *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 78-79, 82 (1858). Exercising its plenary authority, Congress has empowered courts-martial to try servicemembers for any crime defined by the Uniform Code of Military Justice. Art. 2, UCMJ, 10 U.S.C. 802. The court-martial convened below therefore possessed statutory authority to try petitioner on the Alaska child abuse charges.

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[2] After the Court of Military Appeals and the Chief Justice denied petitioner's request for a stay of the proceedings, the court-martial reconvened on February 18, 1986. On March 11, petitioner was convicted on eight of the 14 Alaska specifications and on four other specifications of sexual child abuse. He was sentenced to one year's confinement, to a reduction in pay-grade, and to a bad conduct discharge. His conviction is currently under review by the convening authority, pursuant to Art. 60, UCMJ, 10 U.S.C. 860.

The question in this case is whether that tribunal may constitutionally exercise its statutory authority. Historically, a serviceman could be prosecuted by a court-martial for any offense defined by Congress. But in 1969, this Court held in *O'Callahan* v. *Parker*, 395 U.S. 258, that a court-martial may not exercise its jurisdiction over a servicemember unless, on the facts of the case, the offense has a sufficient impact on military interests that it can be considered "service connected" (*id.* at 267). As the Court has since explained, a variety of considerations are relevant to this question. *Relford* v. *Commandant*, 401 U.S. 355, 365, 367-369 (1971). The ultimate determination focuses on three related inquiries: "[1] the impact of an offense on military discipline and effectiveness, * * * [2] whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and * * * [3] whether the distinct military interest can be vindicated adequately in civilian courts." *Schlesinger* v. *Councilman*, 420 U.S. 738, 760 (1975). Resolving the issue of "service connection" involves "matters of judgment that often turn on the precise set of facts in which the offense has occurred," and is a subject as to which "the expertise of military courts is singularly relevant" (*ibid.*).

Under these standards, we submit that the military appellate courts properly concluded that petitioner's crimes are "service connected" and thus can be subject to court-martial. If the Court disagrees with that submission, however, we urge the Court to reconsider and overrule its decision in *O'Callahan* in order to return to Congress the authority to define court-martial jurisdiction for all persons who are members of the armed forces.

I. The military appellate courts properly found that a variety of factors support the exercise of court-martial jurisdiction in this case. The fact that the victims are military dependents is an important factor, even if it is not dispositive. Crimes committed by a servicemember against a military dependent have a direct and negative

effect on military discipline and effectiveness, particularly when the crimes are committed by a member of the same military command as the victim's parent and in the same community where the parties live and work. Furthermore, petitioner was charged not only with the off-base offenses in Alaska, but also with similar on-base crimes in New York, as to which there was no question of court-martial jurisdiction. Permitting the off-base offenses to be tried together with the on-base charges contributes to judicial economy and reduces the burdens on the military, the civilian court system, the servicemember defendant, and the victims. In addition, the State in this case had a reduced interest in prosecuting petitioner for his offenses, since he and his victims had been transferred from Alaska at the time the offenses were discovered.

Trying petitioner in the military system would not violate his due process right to fair notice that his conduct was subject to prosecution. As a threshold matter, petitioner failed to raise this issue in the lower courts, and he therefore has not preserved the issue for review in this Court. In any event, petitioner's claim is invalid on the merits, because his conduct was unlawful both under the Uniform Code of Military Justice and under state law. He cannot claim to have reasonably relied on the procedural bar of "service connection" to ensure that he would not be prosecuted in the military system, particularly in light of the clear indication by the Court of Military Appeals that it regarded the question of service connection to be an open one with respect to many off-base offenses after this Court's decision in *Relford* v. *Commandant*, *supra*.

II. If the Court concludes that the *O'Callahan* decision would not permit this case to be tried by the military courts, we submit that *O'Callahan* should be reconsidered. For several reasons, the "service connection" requirement that was adopted for the first time in *O'Callahan* should be rejected.

First, *O'Callahan* was a clear departure from prior decisions, which had consistently recognized that military status alone was sufficient to allow a serviceman to be court-martialed for any offense defined by the Uniform Code of Military Justice. *Second*, the primary reason given in *O'Callahan* for the service-connection requirement—the failure of the military justice system to safeguard the rights of defendants—has been significantly undermined by recent changes in the military justice system. A serviceman defendant now enjoys procedural safeguards that make the military system comparable in many important respects to civilian criminal justice systems. *Third*, since *O'Callahan* this Court has emphasized that Congress has the primary responsibility for balancing the needs of the military and the rights of servicemen, and that professional military judgments concerning discipline and effectiveness are entitled to great deference. The policy determination whether a particular serviceman and a particular offense should be subject to court-martial is best made by Congress and the military, not by the courts. *Fourth*, the service-connection requirement has proved confusing and burdensome in practice, because there is no textual or historical benchmark that can be used to guide the inquiry. In sum, Congress ought to be entitled to exercise its historic authority to define the scope of court-martial jurisdiction, and the military should not be required to defend Congress's judgment in each case.

ARGUMENT

I. PETITIONER CAN BE COURT-MARTIALED FOR THE OFF-BASE COMMISSION OF SEXUAL ASSAULT ON A MILITARY DEPENDENT

A. The Alaska Off-Base Child Abuse Offenses Are Service Connected Within The Meaning Of *O'Callahan* v. *Parker*

In *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), this Court held that an off-base sexual assault on a civilian with no connection to the military was not a "service-connected" offense. Two years later, in *Relford* v. *Commandant*, 401 U.S. 355 (1971), the Court held that an on-base sexual assault was clearly service connected, and could properly be tried by court-martial. As this Court noted in *Relford*, the *O'Callahan* case "marks an area, perhaps not the limit, for the concern of the civil courts, and where the military may not enter" (401 U.S. at 369). The *Relford* case, the Court added, "marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time" (*ibid.*). This case lies between *Relford* and *O'Callahan*. What this Court must decide is whether the military courts properly determined that the special military interest in this case is of sufficient magnitude to justify the exercise of court-martial jurisdiction.

In seeking to provide guidance to the lower courts, this Court in *O'Callahan* and *Relford* identified some of the considerations that bear on the question whether a particular offense is sufficiently service connected to be triable by court-martial. In *O'Callahan*, the Court pointed out that the only connection between the offenses and the military was the active duty status of the defendant. The offense occurred at a time when the defendant was properly absent from his military base; the victim was a civilian unconnected to the military; and the crime did

not involve "the flouting of military authority, the security of a military post, or the integrity of military property" (395 U.S. at 273-274). In *Relford*, the Court focused on a number of factors that distinguished that case from *O'Callahan*, particularly the fact that the offense occurred on a military base. See 401 U.S. at 367-369.

It is clear from the opinions in *O'Callahan* and *Relford* that the factors the Court relied on in those cases were not intended to be exclusive. As the Court observed in *Relford*, the special military interest in prosecuting on-post offenses committed by servicemen leads to the conclusion that an offense committed by a serviceman against a person or property on a military base is *per se* "service connected," but that does not mean that an offense committed off the base is necessarily beyond the jurisdiction of the military justice system. 401 U.S. at 369. In the subsequent decision in *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), the Court once again made it clear that the factors relied upon in *O'Callahan* and *Relford* were not meant to be exclusive. The Court there characterized the "service connection" inquiry as turning on "[1] the impact of an offense on military discipline and effectiveness, * * * [2] whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and * * * [3] whether the distinct military interest can be vindicated adequately in civilian courts." 420 U.S. at 760. These questions, the Court added, "are matters as to which the expertise of military courts is singularly relevant" (*ibid.*).

1. The primary factor on which the military appellate courts relied in finding that petitioner's Alaska offenses were service connected was that both victims were the dependents of fellow Coast Guardsmen assigned to the same command as petitioner (Pet. App. 10a, 32a-33a). Petitioner complains that the military courts should not have given weight to that factor (Br. 13-17). In fact, however, the status of the victim as a military dependent

has always been significant in determining whether a crime is service connected. Both the majority and the dissent in *O'Callahan* v. *Parker* recognized that court-martial jurisdiction historically extended to crimes against a person associated with a military installation. 395 U.S. at 274 n.19; *id.* at 278 (Harlan, J., dissenting) (both citing the same passage from W. Winthrop, *Military Law and Precedents* (2d ed. 1896)). *Relford* also called attention to the fact that the defendant's victims were relatives of servicemen. 401 U.S. at 366. And the factors summarized in *Schlesinger* v. *Councilman*—particularly the impact of the offense on military discipline and the greater interest of the military in deterring the offense—are plainly implicated when the victim of the crime is a military dependent. Although the Court of Military Appeals did not rely solely on the fact that petitioner's victims were military dependents, we believe that crimes against military dependents have such a direct, pervasive, and adverse effect on morale, discipline, and military readiness that they could be deemed service connected as a matter of law.

The case for characterizing crimes against military dependents as service connected is a compelling one. The armed forces have a substantial interest in the welfare of military dependents. The military frequently allows a servicemember's family to accompany him on assignments either within the United States or overseas. This policy has a direct, positive effect on recruitment, morale, and efficiency of the armed forces, and those benefits are the same whether a serviceman and his family live on or off the military post. Congress recently recognized "the importance of the military family to the readiness and morale of our forces" (131 Cong. Rec. S10354 (daily ed. July 30, 1985) (Sen. Kennedy)) by enacting the Military Family Act of 1985, Pub. L. No. 99-145, 99 Stat. 678 *et seq.*, which offers a variety of benefits to military

dependents.[3] Events that affect military dependents therefore directly affected military interests.

The sexual abuse of children, in particular, has an immediate and potentially shattering effect on military families. Sexual abuse not only can cause severe and enduring harm to children (see *New York* v. *Ferber*, 458 U.S. 747, 758 & n.9 (1982)), it can also be devastating to the children's parents, who "also are in many ways victims of the crime" (Pet. App. 10a). As the record in this case illustrates, parents of child abuse victims may require psychological counseling (*ibid.*; J.A. 136-139), and their work performance can deteriorate (J.A. 108, 124, 126-127).[4]

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[3] See also 131 Cong. Rec. H9290 (daily ed. Oct. 29, 1985) (Rep. Schroeder) (recognizing that "[w]e cannot maintain a peacetime military" without dealing with the concerns and problems of military dependents); *id.* at H5035 (daily ed. June 26, 1985) (Rep. Panetta); *id.* at S6670-S6671 (daily ed. May 21, 1985) (Sen. Nunn); *id.* at S6670 (daily ed. May 21, 1985) (Sen. Kennedy); *Department of Defense Authorization for Appropriations for Fiscal Year 1986: Hearings on S. 674 Before the Senate Comm. on Armed Services*, 99th Cong., 1st Sess. 719 (1985) (statement of General John A. Wickham, Chief of Staff, U.S. Army) ("if we are concerned about readiness in the Army, which is our most important business, we ultimately must deal with families and quality family support"); Coast Guard COMDTINST 1750.3 *Family Advocacy Program* (Apr. 8, 1983), reprinted at J.A. 56 ("The stress military life imposes on families has become recognized as a significant factor in members' performance and in the morale and efficiency of Coast Guard units.").

[4] Before his daughter was molested, Chief Warrant Officer Johnson had rapidly progressed in rank, but after petitioner's offenses were discovered, Johnson was unwilling to take on added responsibilities (J.A. 108). Petty Officer Grantz, a former Marine combat veteran, testified that learning of and dealing with the sexual abuse of his daughter was more trying emotionally than the year he spent on the Demilitarized Zone in Viet Nam (*id.* at 127). After learning about the offenses against his daughter, he was unable to concentrate on his duties and was less willing to trust his fellow servicemembers (*id.* at 124, 126-127).

When the parent is a servicemember, the armed forces are also injured. Here, the efficiency and readiness of the Coast Guard suffered, because the "fathers could not function as effectively in their Coast Guard duty assignments" (Pet. App. 11a).[5] And "it obviously would [be] difficult—if not impossible—for the victims' fathers" to serve with petitioner again (*ibid.*). The armed forces therefore have a strong interest in protecting the well-being of military dependent children not only for their own benefit, but also for the benefit of their servicemember parents and the service itself.

In addition to the direct impact on the performance and readiness of the servicemembers, the Court of Military Appeals properly concluded that crimes of the sort involved in this case "have a continuing effect * * * on the morale of any military unit or organization to which the [victim's] family member is assigned" (Pet. App. 12a). A crime such as sexual abuse of children generates emotions that can easily result in violent retaliation against the offender (see J.A. 139). At the time of the offenses, the victims' fathers worked every day in the same building with petitioner and lived in the same local community. It was fortuitous that petitioner's crimes were not discovered when the parties were in such close quarters. Without the ability "to vindicate the outrage felt from such a grievous breach of faith by one shipmate towards another" (Pet. App. 34a), the parents or other members of the military community might seek their own vengeance on a servicemember accused of such crimes. That result would have a disastrous effect on

[5] See Pet. App. 10a-12a, 32a-33a; Coast Guard *Family Advocacy Program, supra,* reprinted at J.A. 57 (child abuse detracts from the efficiency of Coast Guard units and impairs the reputation of the service); see also Hasty, *Military Child Advocacy Programs: Confronting Child Maltreatment in the Military Community,* 112 Mil. L. Rev. 67, 74-76 (1986).

military discipline.[6] To avoid that outcome, the military justice system must be able to respond to the reasonable expectations of the military community that its members will be punished for such crimes. See *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 508-509 (1984) ("Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to see justice done. * * * When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions"); *Gregg* v. *Georgia*, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, & Stevens, JJ.).

It is incorrect to say that the effects of petitioner's crimes would have been the same if they had been committed by a civilian. The military is "a specialized society separate from civilian society" (*Parker* v. *Levy*, 417 U.S. 733, 743 (1974)), and it may demand that servicemen respect the integrity of the military community (see *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986), slip op. 4 ("to accomplish its mission the military must foster instinctive obedience, discipline, unity, commitment, and esprit de corps"); *Brown* v. *Glines*,

[6] The military courts have often noted the threat to discipline arising out of sexual assaults by one member of a unit on another member or his dependent. See *United States* v. *Ruggiero*, 1 M.J. 1089, 1097-1098 (C.M.R. 1977), petition denied, 3 M.J. 117 (C.M.A. 1977) (sexual assault on female member of same unit); *United States* v. *White*, 1 M.J. 1048, 1051-1052 (C.M.R. 1976), petition denied, 3 M.J. 109 (C.M.A. 1977) (sexual assault on wife of member of same unit). Cf. *United States* v. *Herring*, 20 M.J. 1002 (C.M.R. 1985) (confrontation off base between two military members will logically continue when they return to duty, threatening maintenance of discipline); *United States* v. *Shorte*, 18 M.J. 518, 520 (C.M.R. 1984) ("[a]n assault with a dangerous weapon by one servicemember on another, regardless of where it occurs has a clear and measurable impact on the morale, reputation and integrity" of the installation), aff'd, 20 M.J. 414 (C.M.A. 1985).

444 U.S. 348, 356-357 n.14 (1980) ("Loyalty, morale, and discipline are essential attributes of all military service")). This need is particularly important for a service like the Coast Guard, which has crews who must be at sea, often for extended periods. Its officers and enlisted personnel must feel secure about the safety of their families in order to perform their duties while away from home. Petitioner's crimes violated the trust that the military seeks to foster among servicemembers. Because of the adverse effect on morale within the unit, the impact on the military of such an offense, when committed by another serviceman, is clearly more damaging than if the offense is committed by a civilian.

In addressing the effect of petitioner's crimes on the military, the courts below focused on the effect that petitioner's conduct had on his command, not merely on the local base or military installation. As the court of military review explained, a command "is more than a physical place or property; it is an organization of people" (Pet. App. 35a). A military commander is responsible for maintaining order within his command, and that obligation "relates to people, without regard to the physical attributes and location of the command" (Pet. App. 35a; see Coast Guard Reg. COMDTINST M500.2, art. 5-1-2 (1980)).

Viewing the impact of criminal conduct on the military command, rather than simply on the military premises, is not inconsistent with *Relford*. The criteria discussed in *Relford* were expressed in terms of their effect on a base, since the crimes there occurred on a military post. Many military units, however, operate away from a base, either temporarily or permanently. The commander of a ship making a visit away from his home port or of an army unit on maneuvers has the same need to maintain discipline within the unit as the commanding officer of a large military installation, where the servicemembers regularly work and live on the post premises.

To restrict court-martial jurisdiction to offenses committed on a military base would render the court-martial sanction almost wholly unavailable to military commands, such as the Coast Guard command in Juneau, that are not based on a discrete military reservation where the servicemembers live and work. If the Alaska crimes had been committed on a military post, they would have been subject to court-martial jurisdiction by virtue of that fact alone. *Relford*, 401 U.S. at 369. In holding that on-base crimes are routinely subject to court-martial jurisdiction, this Court in *Relford* focused on the military's special concern for the security of military personnel and property. Crimes by servicemembers against other servicemembers or their dependents invoke precisely the same concern, even if the servicemembers are members of a command that does not happen to be located on a large tract of military property. There is therefore no reason why the Constitution demands a different result merely because the members of one command live on military property and the members of another live in the local community. Cf. *United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 5-6 (for purposes of applying the *Feres* doctrine, the off-base situs of particular conduct "is not nearly as important as whether the suit requires the civilian court to second-guess military decisions * * * and whether the suit might impair essential military discipline").

Indeed, in some respects, a military command that lacks a major support installation may be especially susceptible to injury from an offense committed outside its geographic bounds. Few bases are completely self-sufficient today (see *United States* v. *Lockwood*, 15 M.J. 1, 9 (C.M.A. 1983)), but small units are often totally dependent on the local civilian community for food, housing, schools, financial institutions, and recreation. This was certainly true of the Coast Guard command in Juneau. The good reputation of the service in that community insured that the Coast Guard command received

local cooperation and that the Coast Guard personnel and their families enjoyed a variety of other benefits there. Petitioner's crimes threatened that reputation and the benefits his fellow servicemen and women derived from it.

In response to these considerations, petitioner argues (Br. 17, 29) that the effect of the Alaska crimes on discipline and the military's reputation was insubstantial, since the crimes never came to public attention and since the fathers were transferred before any confrontation occurred. That argument reduces the determination of service connection to fortuitous events. Under petitioner's formulation, jurisdiction would hinge on the emotional vulnerability of the victim,[7] her ability to conceal an assault until she finally escaped her tormentor, or a servicemember's ability to terrorize his victim. Other, identical crimes would be service connected if they were discovered while the parties were still at the same unit and became matters of public knowledge. The military courts properly gave no weight to the fortuities petitioner suggests.[8]

2. In addition to the status of the victims and the potential effect of the offenses on petitioner's command, the military courts relied on other factors in upholding court-martial jurisdiction in this case. As the courts noted, petitioner's Alaska crimes did not stand alone. Petitioner was also charged with similar offenses against

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[7] As amicus ACLU points out (Br. 29), predicating jurisdiction on an individual's emotional character would "inevitably lead[] to arbitrary results."

[8] The fact that in a particular case the impact of a crime on the military is reduced should not bar court-martial jurisdiction, as long as offenses of that nature typically, or as a class, have such an impact. By analogy, under the Commerce Clause, it is well settled that Congress may regulate a class of intrastate activities that has an effect on interstate commerce even if an individual instance of such an activity has none. See *Russell* v. *United States*, No. 84-435 (June 3, 1985), slip op. 4-5; *Perez* v. *United States*, 402 U.S. 146, 153-154 (1970).

other military dependents on the Coast Guard base at Governors Island, New York (J.A. 6-8), and those on-base crimes were clearly subject to court-martial jurisdiction. *Relford*, 401 U.S. at 369. In these circumstances, the military has a legitimate interest in resolving all the charges against a defendant in a single trial, for a variety of reasons: (1) to allow the defendant to return to his assigned duties if he is exonerated; (2) to enhance the possibility of rehabilitation if he is convicted; (3) to avert the disruptive effect of successive prosecutions in different locations on the victims and their families;[9] (4) to permit the commander to protect the military community against the enhanced dangers posed by recidivist criminal conduct; and (5) to minimize the risk of conflict between the sentencing goals of the military and civilian criminal justice systems.[10] See Pet. App. 14a-16a, 36a-37a; see generally *United States* v. *Lockwood*, 15 M.J. at 8 (the presence of related crimes that are clearly subject to court-martial jurisdiction may be considered in determining whether other offenses may be tried by court-martial). Indeed, in many situations permitting court-martial jurisdiction over off-base charges that are joined with on-base charges will benefit the defendant as well, by permitting all charges to be resolved in a single proceeding, without exposing the defendant to the uncertainty and burden of a second trial.

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[9] The victims in this case obviously would have to testify in a civilian trial in Alaska, but they might well have been required also to testify in the court-martial proceeding in New York, even if that proceeding had been limited to the New York offenses, since petitioner's pattern of conduct with other child abuse victims could have been deemed relevant in that proceeding.

[10] Although the services cannot prevent a state prosecution from going forward after a court-martial, a state is likely to be willing to forgo its own prosecution once the military has court-martialed a servicemember. That is most likely to be the case when the crime involves other servicemembers or military dependents, as was the case here.

3. Both *Relford* (401 U.S. at 368) and *Schlesinger* v. *Councilman* (420 U.S. at 760) note that among the factors justifying the invocation of court-martial jurisdiction is the inability of civilian courts in particular cases to vindicate distinct military interests. In this case, as the military courts noted (Pet. App. 14a, 16a, 34a-35a), the State of Alaska had a reduced interest and ability to prosecute petitioner for the crimes that he committed in Juneau.

After a routine military reassignment, petitioner and his victims left Alaska for distant locations. There is no reason to believe that petitioner or his victims will voluntarily return to Alaska, and the State cannot force the victims to do so, even if it decides to prosecute petitioner. The Court of Military Appeals thus reasonably concluded that a state prosecution was unlikely (Pet. App. 16a). Moreover, when neither the defendant nor his victims are members of the civilian community, the community's interest in seeing the guilty brought to book is greatly reduced. See *United States* v. *Trottier*, 9 M.J. 337, 352 (C.M.A. 1980) (since servicemembers are transients, civilian authorities often have a negligible interest and decline to prosecute cases involving them). Here, the State deferred prosecution of petitioner to the Coast Guard, for a variety of reasons (Br. in Opp. App. 1a-3a). Among them was the belief that petitioner's offenses implicated "a distinct military interest that would not be fully considered in any state prosecution" (*id.* at 3a). Accordingly, this factor also argues strongly in favor of court-martial jurisdiction in this case.

4. In weighing the impact of particular offenses on the military, this Court has noted that it must give great deference to the judgment of the military courts on that subject. The Court of Military Appeals and the courts of military review sit atop Congress's "carefully designed military justice system," which provides "both the experience and expertise * * * to evaluate [a crime's] relevance to military discipline, morale, and fitness."

Schlesinger v. *Councilman*, 420 U.S. at 761 n.34. Congress created the Court of Military Appeals precisely "so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." *Noyd* v. *Bond*, 395 U.S. 683, 694 (1969). That court's judgment therefore reflects precisely the type of expertise that this Court has said is not only "singularly relevant," but also "indispensable," to the inquiry required by *O'Callahan* (*Councilman*, 420 U.S. at 760), and is "normally entitled to great deference" (*Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976)).

Deference to the military courts is particularly appropriate in light of the difficult task that the *O'Callahan* inquiry has assigned to those courts. In the 17 years since *O'Callahan* was decided, the military courts have gradually developed a body of caselaw defining particular offenses as service connected and others as falling outside court-martial jurisdiction.

Petitioner (Br. 15-16) and amici curiae (Army Br. 10; Navy Br. 5-6) are sharply critical of the military court decisions that have extended court-martial jurisdiction to certain off-base offenses. Although petitioner does not expressly seek to limit court-martial jurisdiction to on-base offenses, that would essentially be the effect of the narrow construction of *O'Callahan* and *Relford* that he proposes. While drawing a line between on-base and off-base crimes would provide a bright line test for court-martial jurisdiction, it would impose a tremendous cost on the armed forces. Off-base drug offenses provide a particularly graphic example of that cost.[11] Petitioner and amici criticize the military courts' decisions holding off-base drug offenses to be service connected, but it is

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[11] Drug offenses constitute by far the largest class of off-base offenses prosecuted in the military system. The Army, Air Force, and Coast Guard report that drug cases constituted approximately 85% of the "off-base" cases on appeal in military courts as of June 30, 1986.

well recognized that the military has a compelling interest in preventing drug abuse by servicemembers, regardless of where such misconduct occurs. See generally *Williams* v. *Secretary of the Navy*, 787 F.2d 552, 553-555 & n.1 (Fed. Cir. 1986) (discussing congressional findings and inquiries). It requires little effort to appreciate the debilitating effects of drug offenses on military discipline and readiness, whether the offenses occur on or off post. See *Schlesinger* v. *Councilman*, 420 U.S. at 760-761 n.34; *Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975); *United States* v. *Trottier*, 9 M.J. at 345 ("As military equipment has become more sophisticated, there is the concomitant increased risk that an operator [involved with drugs] will be unable to handle the complicated weapons system with which he is entrusted and upon which his safety and that of others may depend"); S. Rep. 98-53, 98th Cong., 1st Sess. 11 (1983) ("Abuse of controlled substances is one of the most significant disciplinary problems facing the armed forces"); H.R. Rep. 92-433, 92d Cong., 1st Sess. 28 (1971) ("drug abuse is a profoundly serious national problem that is having a grave effect on the Armed Forces").

In 1978, a congressional committee identified as a "major problem" in dealing with drug abuse in the military the requirement of "establishing service connection in the prosecution of military personnel by court martial for offpost drug offenses." House Select Comm. on Narcotics Abuse and Control, 95th Cong., 2d Sess., *A Report on Drug Abuse in the Armed Forces of the United States* 19-20 (Comm. Print 1978). The Court of Military Appeals subsequently held that because of the impact of drug offenses on military discipline and effectiveness, virtually all drug offenses are service connected. See *United States* v. *Trottier*, 9 M.J. at 351; see also *United States* v. *Harper*, 22 M.J. 157, 164 (C.M.A. 1986); *Murray* v. *Haldeman*, 16 M.J. 74, 78-80 (C.M.A. 1983). Since that time, the military has made great strides in ridding itself

of what had formerly been a serious drug problem, in part because the Court of Military Appeals has authorized court-martial prosecutions for off-base drug offenses. See, *e.g.*, *International Narcotic Control Study Missions: Report of the Select Comm. on Narcotics Abuse and Control*, H.R. Rep. 98-951, 2d Sess. 197, 202-216 (1984); R. Bray, *et al.*, *Highlights of the 1985 Worldwide Survey of Alcohol and Nonmedical Drug Use Among Military Personnel* 11-14, 17-22 (1986). In light of these developments, it is clear that a strict on-base/off-base jurisdictional line would have a disastrous effect on the military's continuing efforts to prevent drug use by servicemembers.

Because the Court of Military Appeals is keenly aware of the needs of the military in areas such as drug abuse control and the effect of crimes on military families, that court's judgments on the difficult issue of service connection should be accorded deference. Even on de novo review, we believe that the record below would support the finding of service connection. Applying a more deferential standard of review, the judgment of the Court of Military Appeals clearly should be sustained.

B. Trying Petitioner In the Military System Does Not Violate Due Process

Relying on *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), and *Marks* v. *United States*, 430 U.S. 188 (1977), petitioner claims (Br. 42-46) that, even if his crimes are held to be service connected, that holding cannot be applied to him without violating due process, since it amounts to an unforeseeable retroactive expansion of the scope of court-martial jurisdiction as it stood at the time he committed those offenses. He contends that the Due Process Clause imposes the same restrictions on the courts that the *Ex Post Facto* Clause imposes on Congress. Accordingly, he maintains that, because Congress could not by statute have retroactively expanded court-martial jurisdiction to reach the Alaska

charges, the military courts may not achieve the same result through case-by-case adjudication.

1. Petitioner did not raise this due process claim at the pre-trial hearing, in the court of military review, or in the Court of Military Appeals. He therefore should not be allowed to raise the claim in this Court for the first time. *Berkemer* v. *McCarty*, 468 U.S. 420, 433 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Petitioner has offered no reason for failing to assert this claim in any of the courts below. The decision of the court of military review, which reinstated the charges dismissed by the trial judge, clearly told petitioner that the military courts viewed the Alaska charges as service connected. Petitioner therefore could have raised this claim in the Court of Military Appeals, because by that time, even if not before, he was aware of the construction of court-martial jurisdiction that the military courts were prepared to adopt. Accordingly, there is no need to resolve petitioner's claim in the current posture of this case.

2. In any event, petitioner's claim is wrong on the merits.[12] The Court's decisions in *Bouie* and *Marks* forbid the retroactive application of an unforeseeable judicial expansion of the substantive scope of a criminal

[12] Strictly speaking, the *Ex Post Facto* Clause is not applicable here. The *Ex Post Facto* Clause in terms applies to the legislature, not to the courts. *Frank* v. *Mangum*, 237 U.S. 309, 344 (1915). Neither *Bouie* nor *Marks* modified that longstanding rule, and *Marks* recognized that the Clause "does not of its own force apply to the Judicial Branch of government" (430 U.S. at 191 (citing *Frank* v. *Mangum*, *supra*)). Moreover, courts and legislatures are not similarly situated. Courts can only "construe existing law in actual litigation," rather than "impose by legislation a penalty against specific persons or classes of persons." *James* v. *United States*, 366 U.S. 213, 247 n.3 (1961) (opinion of Harlan, J.). As Justice Harlan explained, it is "obvious" that the policy of restraining arbitrary and potentially vindictive legislation that underlies the *Ex Post Facto* Clause "is inapplicable to decisions of the courts" (*ibid.*). For that reason, neither *Woxberg* v. *United States*, 329 F.2d 284 (9th Cir.), cert. denied, 379 U.S. 823 (1964), nor *United States* v. *Juvenile*, 599 F. Supp. 1126 (D. Or. 1984), aids petitioner, because both cases involved statutory amendments.

statute to reach conduct that a person could not reasonably have believed was criminal at the time he engaged in it.[13] As the Court summarized in *Splawn* v. *California*, 431 U.S. 595, 601 (1977), "*Bouie* * * * holds that the elements of a statutory offense may not be so changed by judicial interpretation as to deny to accused defendants fair warning of the crime prohibited."

No "fair warning" concern is present here, since petitioner had ample warning that his conduct was a crime. That conduct has been a crime under provisions of the UCMJ that have remained unchanged since 1950 (Arts. 80, 120, 128, 134, UCMJ, 10 U.S.C. 880, 920, 928, 934), and nothing in the decisions below expanded or modified the definition of those offenses. Petitioner's conduct also violated Alaska law (Alaska Stat. §§ 11.41.410 to 11.41.470 (1983)), which renders untenable any claim that he could have believed that his conduct was innocent. See *United States* v. *Bass*, 404 U.S. 336, 348 n.15 (1971); *Knutson* v. *Brewer*, 619 F.2d 747, 750-751 (8th Cir. 1980). In addition, *O'Callahan* did not rule that the question whether a particular offense is service connected is an ingredient of the crime itself or must be set forth by statute or established by case law with the same de-

[13] *Bouie* held that due process barred the conviction of two black college students for their refusal to leave an "all-white" lunch counter where the "narrow and precise" (378 U.S. at 352) state criminal trespass statute under which they were convicted on its face prohibited only the entry onto the property of another in violation of previously-given notice (*id.* at 349 n.1), and where, prior to the conduct at issue, that statute had never been construed to cover the refusal to leave the property of another (*id.* at 350). *Marks* held that the new standard for determining the constitutionality of obscene materials that was adopted in *Miller* v. *California*, 413 U.S. 15 (1973), could not be retroactively applied to conduct that occurred prior to the decision in *Miller*. 430 U.S. at 196-197.

gree of precision that is necessary for the elements of a crime. On the contrary, the Court's later decisions in *Relford* and *Councilman* expressly endorsed an *ad hoc* approach to the question whether a particular crime is service connected. 401 U.S. at 369; 420 U.S. at 760.[14]

Petitioner contends (Pet. 44-45), however, that the fair warning concerns underlying *Bouie* and *Marks* are also applicable to the service-connection determination required by *O'Callahan*, on the ground that a serviceman is entitled to know whether he will be subject to a court-martial at the time that he commits a crime. But the "fair warning" concern underlying *Bouie* and *Marks* has no parallel in this context. The conduct charged against petitioner was clearly a crime, and he cannot legitimately rely on procedural barriers to his prosecution for those offenses at the time he committed them. See *United States* v. *Ross*, 456 U.S. 798, 824 n.33 (1982). Thus, because "no legitimate reliance interest can be frustrated" (*id.* at 824) by a case-by-case method of determining service connection, the rule stated in *Bouie* cannot be combined with the rule created by *O'Callahan* in the manner that petitioner suggests.

In any event, the military courts' rulings were not unforeseeable. In claiming that the decision below was unforeseeable, petitioner relies on three opinions of the Court of Military Appeals rendered before this Court's 1971 decision in *Relford* v. *Commandant*, *supra*. In those cases, the Court of Military Appeals had ruled that the crime of sexual child abuse was not subject to a court-

[14] Court-martial jurisdiction is defined by statute, and the UCMJ vests the military justice system with jurisdiction over all servicemembers for any offense defined in the UCMJ. Art. 2, UCMJ, 10 U.S.C. 802. Establishing that a crime is service connected does not vest a court-martial with jurisdiction over that offense; rather, that showing simply makes it "appropriate" for a military tribunal to exercise its already-existing jurisdiction. *Gosa* v. *Mayden*, 413 U.S. 665, 674, 677 (1983) (plurality opinion). Contrary to petitioner's suggestion (Br. 44), the judgment below therefore did not extend court-martial "jurisdiction" to petitioner in the first instance.

martial when that offense occurred outside a military base, since *O'Callahan* required "some connection 'between [the defendant's] military duties and the crimes in question'" to establish service connection (*United States* v. *McGonigal*, 19 C.M.A. 94, 95, 41 C.M.R. 94, 95 (1969)). See also *United States* v. *Shockley*, 18 C.M.A. 610, 611, 40 C.M.R. 322, 323 (1969); *United States* v. *Henderson*, 18 C.M.A. 601, 602, 40 C.M.R. 313, 314 (1969).

This Court's decision in *Relford* undermined the rationale applied by the Court of Military Appeals in its prior opinions on this issue. *Relford* held that the status of a victim as the dependent of a serviceman is an important consideration in determining whether an offense is appropriately subject to court-martial jurisdiction. 401 U.S. at 366. *Relford* also rejected the argument that a crime must be connected with a serviceman's "military duties" before it can be tried by a court-martial. *Id.* at 363-364, 366, 369. The Court of Military Appeals indicated in *Trottier*, 9 M.J. at 342-345, and *Lockwood*, 15 M.J. at 5-6, 10, that its pre-*Relford* decisions would have to be reconsidered in light of this Court's decision in that case. The Court of Military Appeals also specifically pointed out that its prior decisions regarding off-base crimes would be reexamined.[15] Those decisions by the highest military court put petitioner on notice that the military might seek to court-martial him for crimes such as these. Because petitioner could have reasonably foreseen the rulings in this case, there is no merit to his claim that he lacked adequate notice of the prospect that he might be tried before a court-martial. See *United*

[15] Although the Court of Military Appeals' decision in *Trottier* involved a narcotics offense, the opinion does not suggest, as petitioner (Br. 43-44) and the ACLU (Br. 57-59) claim, that that court's revised approach to court-martial jurisdiction would be limited to such crimes. See *United States* v. *Lockwood*, *supra* (off-base fraud offenses are service connected).

States v. *Rodgers*, 466 U.S. 475, 484 (1984); *Lockett* v. *Ohio*, 438 U.S. 586, 597 (1978); *Welton* v. *Nix*, 719 F.2d 969, 970 (8th Cir. 1983).[16]

II. THIS COURT'S DECISION IN *O'CALLAHAN* v. *PARKER* WARRANTS RECONSIDERATION

If petitioner's acts of sexual assault on military dependents are not service connected under *O'Callahan*, then there is something seriously wrong with that decision. The practical effect of ruling that petitioner's crimes are not service connected will be to divest military courts of jurisdiction presently exercised over numerous other offenses committed outside a military base. That loss of authority will have a serious detrimental impact on the military's ability to maintain order, discipline, and readiness. Accordingly, if the Court disagrees with our submission in Point I, we urge the Court to reexamine the service-connection requirement adopted in *O'Callahan* and to return to Congress the authority it historically possessed to define court-martial jurisdiction.

A. The Doctrine Of *Stare Decisis* Does Not Preclude Reconsideration Of *O'Callahan* v. *Parker*

The doctrine of *stare decisis* serves important purposes in our legal system. It promotes the evenhanded, predictable, and consistent development of legal principles; it fosters reliance on judicial rules; and it contributes to the fact and appearance of integrity in our judicial system. See, *e.g.*, *Vasquez* v. *Hillery*, No. 84-836 (Jan. 14, 1986), slip op. 11; *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion). Nonetheless, as Justice Frankfurter explained, "*stare decisis* is

[16] Petitioner does not suggest that he relied on the Court of Military Appeals' pre-*Relford* decisions when he planned or carried out the Alaska crimes. In any event, because those acts violated both the UCMJ and Alaska law, any such reliance would not be entitled to any weight. *United States* v. *Ross*, 456 U.S. at 824 n.33; cf. *United States* v. *Bass*, 404 U.S. at 348 n.15.

a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940). For that reason, "[i]t is * * * not only [the Court's] prerogative but also [its] duty to reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into question." *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 627-628 (1974) (Powell, J., concurring). See also *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58 n.30 (1977); *Garcia* v. *San Antonio Metropolitan Transit Auth.*, No. 82-1913 (Feb. 19, 1985), slip op. 8-28; *Erie R.R.* v. *Tomkins*, 304 U.S. 64 (1938).

Although this Court has never adopted a "rigid formula" for determining when to overrule a prior decision (*Vasquez*, slip op. 11), it has identified several factors that bear on this inquiry. It is well settled that *stare decisis* has less force when constitutional issues, rather than matters of statutory construction, are involved, because "correction through legislative action is practically impossible." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).[17] In addition, *stare decisis* has less weight when the prior ruling was itself a departure from past precedents,[18] when new circumstances or subsequent decisions have eroded the rationale or the precedential value of the prior decision,[19]

[17] See also, *e.g.*, *Thomas* v. *Washington Gas Light Co.*, 448 U.S. at 272-273 (plurality opinion); *Monell* v. *Department of Social Services*, 436 U.S. 658, 695 (1978); *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974).

[18] *E.g.*, *Thomas*, 448 U.S. at 273 (plurality opinion); *Monell*, 436 U.S. at 696; *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. at 47; *United States* v. *Darby*, 312 U.S. 100, 116-117 (1941).

[19] *E.g.*, *United States* v. *Leon*, 468 U.S. 897, 908-913 (1984); *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 357-361 (1984); *United States* v. *Salvucci*, 448 U.S. 83, 88 (1980); *Hughes* v. *Okla-*

and when experience demonstrates that the earlier rule has proved unworkable, has bred confusion, or has led to unforeseen or anomalous results.[20] In sum, *stare decisis* "bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function" (285 U.S. at 407-408 (footnote omitted)). When the decision in *O'Callahan* is carefully analyzed, the foregoing considerations dictate reconsideration and rejection of the service-connection requirement imposed by that case.[21]

B. *O'Callahan* Was A Radical Departure From The Court's Prior Decisions

O'Callahan was "'a clear break with the past.'" *Gosa* v. *Mayden*, 413 U.S. 665, 672 (1973) (plurality opinion) (citation omitted). In an unbroken line of decisions extending back to 1858, this Court had recognized that (1) Congress had the authority to define court-martial offenses, (2) neither the Fifth Amendment right to indictment by a grand jury nor the Sixth Amendment right to trial by a petit jury applied to

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homa, 441 U.S. 322, 331-332 (1979); *Brown* v. *Board of Education*, 347 U.S. 483, 492-495 (1954); *Tigner* v. *Texas*, 310 U.S. 141, 145-147 (1940).

[20] *E.g.*, *Garcia* v. *San Antonio Metropolitan Transit Auth.*, slip op. 18; *Continental T.V., Inc.*, 433 U.S. at 47; see also *Texas* v. *McCullough*, No. 84-1198 (Feb. 26, 1986), slip op. 6-8; *Wainwright* v. *Witt*, No. 83-1427 (Jan. 21, 1985), slip op. 8-13.

[21] The Court is less reluctant to reconsider a prior decision when doing so will not disturb legitimate reliance. *E.g.*, *Arkansas Electric Coop. Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 392 (1983); *Ross*, 456 U.S. at 824 n.33; *Monell*, 436 U.S. at 699-700. As we have noted above, no such interests are implicated by *O'Callahan*. Page 26, *supra*.

court-martial proceedings, and (3) "military status in itself was sufficient for the exercise of court-martial jurisdiction" (*id.* at 673 (plurality opinion)).[22] As the Court had observed less than a decade before *O'Callahan*, "[t]he test for jurisdiction * * * is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.' * * * Without contradiction, the materials furnished show that military jurisdiction has always been based on the status of the accused, rather than on the nature of the offense." *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 240-241, 243 (1960) (emphasis in original).[23] In these circumstances, where a prior decision not only "announce[d] a new constitutional principle," but also "effected a decisional change in attitude that had prevailed for many decades" (*Gosa*, 413 U.S. at 673 (plurality opinion)), considerations of *stare decisis* "cut in both directions"

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[22] See *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 78-79, 82 (1858); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *id.* at 137-138 (opinion of Chase, C.J.); *Coleman* v. *Tennessee*, 97 U.S. 509, 514 (1878); *Ex parte Reed*, 100 U.S. 13, 21 (1879); *Ex parte Mason*, 105 U.S. 696, 700-701 (1881); *Smith* v. *Whitney*, 116 U.S. 167, 182-186 (1886); *Johnson* v. *Sayre*, 158 U.S. 109, 114 (1895); *Grafton* v. *United States*, 206 U.S. 333, 348 (1907); *Kahn* v. *Anderson*, 255 U.S. 1, 8-9 (1921); *Ex parte Quirin*, 317 U.S. 1, 40-44 (1942); *Whelchel* v. *McDonald*, 340 U.S. 122, 126-127 (1950); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 & n.5 (1955); *Reid* v. *Covert*, 354 U.S. 1, 19-20, 22, 37 n.68 (1957) (plurality opinion); *id.* at 41-43 (Frankfurter, J., concurring in the result); *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 240-241, 243, 246 (1960).

[23] See also, *e.g.*, *Reid*, 354 U.S. at 19 (plurality opinion) (the "natural meaning [of Art. I, § 8, Cl. 14] * * * refers to persons who are members of the armed services"); *Ex parte Milligan*, 71 U.S. (4 Wall.) at 123 ("Everyone connected with these branches of the [military] service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts.").

(*Monell* v. *Department of Social Services*, 436 U.S. 658, 708 (1978) (Powell, J., concurring)).[24]

C. Developments In The Military Justice System Over The Past Two Decades Have Undercut The Rationale Of *O'Callahan*

The principal reason given in *O'Callahan* for limiting court-martial jurisdiction was that the military justice system did not adequately protect the rights of servicemembers charged with crimes. 395 U.S. at 263-266. Because military tribunals did not provide servicemembers with procedural safeguards comparable to those found in civilian courts, *O'Callahan* explained, court-martial jurisdiction should be limited to " 'the least possible power adequate to the end proposed' " of maintaining an adequate fighting force (*id.* at 265 (citation omitted)). That rationale lacks force today, because *O'Callahan*'s description of the military justice system is no longer accurate. Current military procedure bears faint resemblance to that of 30 years ago under which Sergeant O'Callahan was tried. The military criminal justice system has undergone profound changes as the result of three major congressional amendments to the UCMJ,[25] two major revisions of the *Manual for Courts-Martial*,[26] the promulgation of regulations by each branch of the armed forces governing criminal procedure, and the experience gained by military courts in criminal law and procedure. These developments show that the criticisms voiced in *O'Callahan* no longer have merit.[27]

1. *O'Callahan* was particularly concerned with the process by which a court-martial was convened. At the time of Sergeant O'Callahan's trial, the authority who convened a court-martial[28] appointed the presiding officer, the members of the court-martial panel, and counsel for the prosecution and defense. *Manual for Courts-Martial* para. 4g(1) (1951). Since a convening officer "usually ha[d] direct command authority" over court-martial participants, the Court in *O'Callahan* was concerned by "the possibility of influence on the actions of the court-martial by the officer who convenes it" (395 U.S. at 264). In recognition of that concern, important safeguards have been established to eliminate the possibility of improper influence by the convening officer over the trial judge, defense counsel, and court-martial members.

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[24] *O'Callahan*'s abrupt departure from the foregoing line of precedents might have been justified if the Court had revisited historical materials not fully analyzed by its prior decisions. See *Monell*, 436 U.S. at 664-689. But the *O'Callahan* Court did not do so. Amicus Army Defense (Army Br. 11-14) argues that the Framers intended to limit court-martial jurisdiction to purely military offenses, since court-martial jurisdiction had been so limited under the Articles of War during the American Revolution. We submit that this argument is flawed for the reasons given by Justice Harlan in his dissent in *O'Callahan*. 395 U.S. at 277-282; see also Comment, 15 Vill. L. Rev. 712, 719 n.38 (1970). At worst, the relevant English and American history is a draw. Nelson & Westbrook, *Court-Martial Jurisdiction Over Servicemen For "Civilian" Offenses: An Analysis of* O'Callahan *v.* Parker, 54 Minn. L. Rev. 1, 8-19 (1969). Accordingly, in determining whether *O'Callahan* was correctly decided, the Court should not " 'disregard the implications of an exercise of judicial authority assumed to be proper for [100] years' " (*Monell*, 436 U.S. at 696 (citation omitted)).

[25] See Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335; Military Justice Amendments of 1981, Pub. L. No. 97-81, 95 Stat. 1085; Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

[26] See *Manual for Courts-Martial* (1969); *Manual for Courts-Martial* (1984). The Manual is now reviewed and updated yearly. Exec. Order No. 12,473, 3 C.F.R. 201 (1984).

[27] These important changes contradict petitioner's assertion (Br. 9) that "[n]o developments since then, in the military or society" justify overruling *O'Callahan*. Even Amici Army and Navy Defense Appellate agree that the quality of military justice has improved since *O'Callahan* (Army Br. 20; Navy Br. 14).

[28] Arts. 22-24, UCMJ, 10 U.S.C. 822-824, list the persons who may convene a court-martial.

a. The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, replaced the presiding or law officer with a military judge, an attorney specially selected by the Judge Advocate General on the basis of his experience and expertise in military criminal law.[29] In cases tried by a general court-martial,[30] the judge is a subordinate of the Judge Advocate General, not of the convening authority. The 1968 Act also prohibited the convening authority or a member of his staff from preparing or even reviewing any report about a judge's fitness in the performance of his judicial duties.[31] Art. 26(c), UCMJ, 10 U.S.C. 826(c). The Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, eliminated all vestiges of command control over military judges by divesting the convening authority of authority to designate the trial judge in a particular case. Art. 26(a), UCMJ, 97 Stat. 1393, 1394. And in 1984, the President required that judges must be detailed to a court-martial by other persons who are assigned to judicial duties. *Manual for Courts-Martial*, Rule for Courts-Martial 503(b) (1984) [hereinafter cited as *Manual*, RCM]. In sum, military trial judges are no longer subject to command influence

[29] See, *e.g.*, Art. 26(b), UCMJ, 10 U.S.C. 826(b); *Coast Guard Military Justice Manual* COMDTINST M5810.1A, § 303-2 (Apr. 10, 1985); *Army JAGC Personnel Policies* para. 8-1, Selection of Military Judges (1985-1986).

[30] Compare Art. 18, UCMJ, 10 U.S.C. 818 (jurisdiction of general courts-martial), with Art. 19, UCMJ, 10 U.S.C. 819 (jurisdiction of special courts-martial), and Art. 20, UCMJ, 10 U.S.C. 820 (jurisdiction of summary courts-martial). See generally *Middendorf* v. *Henry*, 425 U.S. 25, 31-33 (1976).

[31] Although *O'Callahan* mentioned this amendment in a footnote (395 U.S. at 264 n.3), that revision was not effective at the time of the Court's decision. *O'Callahan*'s criticisms of the military justice system therefore could not have taken into account the operation of the new system and were premised on the fact that the presiding officer was a subordinate of the convening authority (*id.* at 264), which was true at the time Sergeant O'Callahan was tried, but is not true today.

and now possess virtually the same degree of judicial independence as their civilian counterparts.[32]

b. It is also no longer possible for a convening authority to influence the manner in which defense counsel are selected or perform their duties. The Military Justice Act of 1968 forbade convening authorities and commanding officers from criticizing defense counsel for zealously representing their clients. Art. 37(b), UCMJ, 10 U.S.C. 837(b); see also *Manual*, RCM 104(b)(1)(B). To "remove any hint or possibility of impartial command influence in the selection of such court-martial personnel" (S. Rep. 98-53, 98th Cong., 1st Sess. 13 (1983)), the Military Justice Act of 1983 required the Secretary of each service to prescribe by regulation how defense counsel will be appointed, rather than leaving that decision to the convening authority. Art. 27(a)(1), UCMJ, 97 Stat. 1394. The Secretaries of the Army and the Air Force have created separate corps of defense counsel under the supervision of the Judge Advocate General of each service, thereby removing such personnel from the command of convening authorities.[33] The Navy has also created a system that separates defense counsel from the

[32] To be sure, military trial judges do not enjoy the life tenure and salary protections possessed by Article III judges. That fact, which was noted in *O'Callahan* (395 U.S. at 264), is still unchanged. At the same time, a servicemember tried before a military judge is "no more disadvantaged and no more entitled to an Art. III judge than any other citizen of any of the 50 States who is tried for a strictly local crime." *Palmore* v. *United States*, 411 U.S. 389, 410 (1973). As *Palmore* makes clear, "trial by a nontenured judge [does not] deprive [a federal defendant] of due process of law under the Fifth Amendment any more than the trial of the citizens of the various States for local crimes by judges without protection as to tenure deprives them of due process of law under the Fourteenth Amendment." *Ibid.*

[33] See Army Reg. 27-10, ch. 6 (Dec. 10, 1985); Air Force Reg. 111-1, paras. 3-6, 13-3 (Aug. 1, 1984).

convening authority's chain of command.[34] And the Coast Guard has also taken steps to ensure that defense counsel are independent.[35]

c. Congress and the President have also sought to insulate court-martial members from command influence. A 1968 amendment to Article 37 of the UCMJ, which already forbade the censure or reprimand of court-martial members for the manner in which they perform their duties, added a prohibition against adverse comments in fitness reports. Art. 37(b), UCMJ, 10 U.S.C. 837(b). The President emphasized these prohibitions when he issued the 1984 *Manual* by expressly enjoining all forms of influence over court-martial members. *Manual*, RCM 104(a) and (b). As an additional protection, the military courts have been vigilant to ensure that commanders do not influence court-martial members. See, *e.g.*, *United States* v. *Miller*, 19 M.J. 159, 163-165 (C.M.A. 1985); *United States* v. *Grady*, 15 M.J. 275, 276 (C.M.A. 1983); *United States* v. *Rosser*, 6 M.J. 267, 271 (C.M.A. 1979).[36]

2. *O'Callahan* faulted the military criminal justice system because it used rules of evidence, procedure, and discovery that were markedly different from the ones applied in civilian courts. 395 U.S. at 264. That description is no longer accurate.

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[34] See *Navy Legal Services Office Manual*, NAVLEGSVCINST 5800.1, Sections 0100-0104, 0401(a)-(c) (Apr. 18, 1980). Moreover, in the Marine Corps fitness reports on defense counsel are prepared by an independent Regional Defense Counsel. Marine Corps Order 5800.11A (Nov. 15, 1985).

[35] The Coast Guard is not large enough to warrant establishing a separate corps of defense counsel, but the Coast Guard permits a defendant to request an attorney who is not assigned to duty within the geographic region of the commander who convened the court-martial. *Coast Guard Military Justice Manual* COMDTINST M5810.1A, § 302-2 (Apr. 10, 1985).

[36] These cases are not, as some contend (Army Br. 18-19), an argument for restricting court-martial jurisdiction, but are a vivid demonstration that the system can ferret out and correct errors.

In 1980, the President amended the *Manual* by issuing the Military Rules of Evidence. Executive Order No. 12,198, 3 C.F.R. 151 (1980). The Military Rules are identical to the Federal Rules of Evidence, except where necessary to meet unique military concerns. S. Saltzburg *et al.*, *Military Rules of Evidence Manual* 1, 5 (1981); Analysis of the 1980 Amendments, *Manual* A22-51; *e.g.*, *United States* v. *Powell*, 22 M.J. 141, 143-145 (C.M.A. 1986); *United States* v. *Gonzalez*, 16 M.J. 58, 60 (C.M.A. 1983). One of the principal reasons for the 1984 revision of the *Manual* was to "conform [court-martial procedure] to Federal practice to the extent possible" (Analysis of the 1980 Amendments, *Manual* A21-1).[37] The remaining differences are required by military needs and cannot be described as "substantial" (*O'Callahan*, 395 U.S. at 264).[38]

Defense discovery was initially broadened in the 1969 revision of the *Manual* "to make it clear that the defense is entitled to the equal opportunity to prepare his case."[39] RCM 701(a), the discovery rule in the current *Manual*, "is intended to promote full discovery to the maximum extent possible," and it "provides for broader discovery than is required in Federal practice." Analysis, *Manual*

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[37] Art. 36, UCMJ, 10 U.S.C. 836, authorizes the President to prescribe procedures for courts-martial. It provides that these rules shall "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," unless the UCMJ or the President provides otherwise.

[38] For example, Mil. R. Evid. 404(a)(2) (*Manual* at III-19) allows the prosecution to introduce character evidence of a victim's peaceful behavior in assault cases, because of the military's need to deter unlawful assaults by servicemembers living in close quarters. Compare Fed. R. Evid. 404(a)(2) (similar rule limited to homicide cases in which self-defense is claimed). S. Saltzburg *et al.*, *supra*, at 185.

[39] Air Force Summary of Changes to the *Manual for Courts-Martial, 1969*, ch. XXIII, at 44 (1969).

A21-29; see also *United States* v. *Toledo*, 15 M.J. 255, 256 (C.M.A. 1983); Moyer, *Procedural Rights of the Military Accused: Advantages Over A Civilian Defendant*, 22 Me. L. Rev. 105, 114-117 (1970).[40] Additionally, in cases tried by a general court-martial, there is a pretrial investigation that is similar to a full preliminary hearing in the civilian system. Art. 32, UCMJ, 10 U.S.C. 832; *Manual*, RCM 405(f) and (g). That hearing affords the accused the opportunity to preview the government's case and to cross-examine its witnesses, thereby providing an important discovery vehicle not generally available in civilian criminal proceedings. *Manual*, RCM 405(a) Discussion, at II-37; *Gosa*, 413 U.S. at 681 n.6 (plurality opinion); *United States* v. *Ledbetter*, 2 M.J. 37, 43 (C.M.A. 1976); Moyer, *supra*, 22 Me. L. Rev. at 114-117.

A variety of other changes in the military justice system have contributed to making military prosecutions much more like their civilian counterparts than they were at the time of Sergeant O'Callahan's trial. For example, the Military Justice Act of 1968 gave a defendant

[40] For example, RCM 701 not only requires the government to disclose to the defense all items covered by Fed. R. Crim. P. 16(a), but it also requires that, upon service of the charges, the defense must be furnished with copies of all sworn or signed statements relating to the charges, the names and addresses of all witnesses the prosecution intends to call, and an opportunity to interview the government's witnesses. By contrast, in a federal criminal prosecution, statements of a witness need not be furnished to the defense until after the witness has testified at trial (18 U.S.C. 3500(a)), and there is no statutory requirement that the government provide the defense with a list of or the opportunity to interview its witnesses.

O'Callahan also criticized military discovery procedure on the ground that the process for obtaining evidence and witnesses was "to a significant extent, dependent upon the approval of the prosecution" (395 U.S. at 264 n.4). Under the current system, however, the military judge is solely responsible for controlling the discovery process. *Manual*, RCM 701(g); see Moyer, *supra*, 22 Me. L. Rev. at 123-125.

the right to request a trial by a military judge alone and provided for a form of release pending review that is similar to bail pending appeal, through deferral of punishment. Arts. 16 and 57(d), UCMJ, 10 U.S.C. 816 and 857(d). The Military Justice Act of 1983 provided for defense counsel to assist a defendant throughout the post-trial direct review process. Art. 38(c), UCMJ, 97 Stat. 1395. The 1984 *Manual* established procedures for determining whether a defendant may be confined before trial, including a hearing at which the member is entitled to counsel (*Manual*, RCM 305), and it created speedy trial requirements similar to those applicable in the federal courts (RCM 707). The military justice system is therefore no longer subject to the criticism voiced in the *O'Callahan* opinion for following procedures that impaired the fairness of the fact-finding process and undermined the independence of the court, the court-martial members, and counsel for the defendant.

3. *O'Callahan* broadly declared that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law." 395 U.S. at 265. To buttress that assertion, *O'Callahan* pointed to Article 134 of the UCMJ, 10 U.S.C. 934, which prohibits, inter alia, "all disorders and neglects to the prejudice of good order and discipline in the armed forces." *O'Callahan* hinted that Article 134 was unconstitutionally vague. In *Parker* v. *Levy*, however, the Court ruled that Article 134 and its counterpart Art. 133, UCMJ, 10 U.S.C. 933, which prohibits conduct unbecoming an officer and a gentleman, are not unconstitutionally vague. 417 U.S. at 757.

This Court's perception of the military justice system has also changed. Six years after *O'Callahan*, this Court was willing to assume that "the military court system will vindicate servicemen's constitutional rights." *Schlesinger* v. *Councilman*, 420 U.S. at 758; see also *Middendorf* v. *Henry*, 425 U.S. at 43. In the years since *O'Callahan*, military trial and appellate courts have gained

considerable experience in resolving constitutional issues.[41] And the Military Justice Act of 1983 gave this Court jurisdiction, for the first time, to review the decisions of the Court of Military Appeals, which will enable this Court more directly to supervise the administration of justice by the military courts. Art. 67(h), UCMJ, 10 U.S.C. (Supp. II) 867(h); 28 U.S.C. (Supp. II) 1259.

D. *O'Callahan* Is Inconsistent With Subsequent Decisions Deferring To Congressional And Professional Military Judgments On Matters Of Military Discipline And Readiness

Underlying the ruling in *O'Callahan* was the view that the Constitution required the courts in each case to balance de novo Congress's authority to govern the armed forces against a servicemember's rights to indictment and a jury trial. The Court rejected Justice Harlan's view that the Court was improperly allocating to itself the task of making a determination that "the Constitution has placed in the hands of the Congress" (395 U.S. at 275 (dissenting opinion)). Since *O'Callahan*, however, the Court has repeatedly endorsed Justice Harlan's position that Congress has the primary responsibility for striking the proper balance between the military's needs and servicemembers' rights, and that professional military judgments on matters of discipline and effectiveness are entitled to particular deference. See *Goldman*, slip op. 4-5; *Chappell* v. *Wallace*, 462 U.S. 296, 300-305 (1983); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-66, 70-71 (1981);

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[41] See, *e.g.*, *United States* v. *Sauer*, 15 M.J. 113 (C.M.A. 1983) (Self-Incrimination Privilege); *Cooke* v. *Orser*, 12 M.J. 335 (C.M.A. 1982) (Due Process Clause); *United States* v. *Ezell*, 6 M.J. 307 (C.M.A. 1979) (search and seizure); *United States* v. *Rivas*, 3 M.J. 282 (C.M.A. 1977) (effective assistance of counsel); see also S. Rep. 98-53, *supra*, at 33 (noting that "the very success of the Court [of Military Appeals] has called into question the basis for excluding review by the Supreme Court").

Brown v. *Glines*, 444 U.S. at 357, 360; *Middendorf* v. *Henry*, 425 U.S. at 43; *Greer* v. *Spock*, 424 U.S. 828, 837-838 (1976); *Schlesinger* v. *Councilman*, 420 U.S. at 753; *Parker* v. *Levy*, 417 U.S. at 756; *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973); cf. *Shearer*, slip op. 6. That deference is rooted in the express constitutional commitment of the governance of the nation's armed forces to Congress and the President (Art. I, § 8; Art. II, § 2, Cl. 1), and in the unsuitability of most military decisions to civilian court review. See, *e.g.*, *Goldman*, slip op. 4.

Congress is in the best position to decide what crimes and servicemembers should be subject to court-martial jurisdiction as a general matter. The rationale of the service-connection doctrine is that a crime must affect military interests before a court-martial may exercise its jurisdiction over that offense. Insofar as that determination rests on policy and factual matters, Congress is clearly the institution best suited to make that judgment.

The President and his military subordinates are in the best position to decide in an individual case whether a servicemember should be court-martialed for a particular crime. A commanding officer bears the ultimate responsibility for maintaining discipline within his unit (see, *e.g.*, Coast Guard Reg. COMDTINST M5000.3, art. 4 1-12 (1980)), and he is best situated to gauge the effect of a particular violation of military law on discipline, readiness, and morale. In making these determinations, a commanding officer must rely on his training and experience, which have no parallel in the civilian community, and his judgment often cannot be expressed in terms of the criteria listed in *Relford*. As the Court has often stated, the " 'complex, subtle, and professional decisions as to the * * * training * * * and control of a military force are essentially professional military judgments' " (*Chappell*, 462 U.S. at 302 (citation omitted)). By contrast, the civilian courts are " 'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have' " (*id.* at

305, quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 187 (1962)). See *Goldman*, slip op. 4.

E. The Service-Connection Requirement Adopted In *O'Callahan* Has Proved Confusing And Burdensome In Practice

1. As Justice Harlan predicted in his dissent in *O'Callahan*, the service-connection requirement has "creat[ed] confusion and proliferate[d] litigation over * * * jurisdictional issue[s] (395 U.S. at 284). Although *Relford* settled the question of jurisdiction over on-base offenses, it has exacerbated the confusion over off-base crimes. Perhaps the clearest example of this confusion is in the area of off-base drug offenses.

Shortly after *O'Callahan* was decided, the Court of Military Appeals held that drug offenses were of such "singular military significance" that their trial by court-martial was not affected by that case. *United States* v. *Beeker*, 18 C.M.A. 563, 565, 40 C.M.R. 275, 277 (1969). Seven years later, however, using a mechanical application of the factors enumerated in *O'Callahan* and *Relford*, the same court concluded that off-base drug offenses by a servicemember had an insufficient effect on the military to support court-martial jurisdiction. *United States* v. *Williams*, 2 M.J. 81, 82 (C.M.A. 1976); *United States* v. *McCarthy*, 2 M.J. 26, 29 (C.M.A. 1976). In fact, in *United States* v. *Conn*, 6 M.J. 351 (C.M.A. 1979), the court held that the off-base use of marijuana by a superior officer in the presence of his subordinates, all of whom were military policemen, was not service connected. In 1980, however, the Court of Military Appeals once more reversed its position. Again considering factors set out in *O'Callahan* and *Relford*, the Court of Military Appeals held that "the gravity and immediacy of the threat to military personnel and installations posed by the drug traffic and by drug abuse convince us that very few drug involvements of a service person will not be

'service connected.'" *Trottier*, 9 M.J. at 351 (footnote omitted). See also *United States* v. *Harper*, 22 M.J. at 164; *Murray* v. *Haldeman*, 16 M.J. at 78-80. In this case, too, the Court of Military Appeals acknowledged that it had revised its position as to whether the off-post sexual assault of military dependents was service connected (Pet. App. 9a). These examples refute petitioner's claim (Br. 8) that the service-connection doctrine has become a "well-defined principle of law." [42]

2. *O'Callahan* has also required a substantial expenditure of time and resources in litigating jurisdictional issues. In this case, for example, litigation of the jurisdictional issue consumed two days in the trial court and nine months on appeal before petitioner's guilt or innocence of the charges could be considered.[43] In the military, the diversion of resources from the determination of a defendant's guilt or innocence is not the only cost. Evidentiary hearings are common, and they frequently require testimony from commanders, superior officers, and military law enforcement officials about the

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[42] Petitioner argues (Br. 37-39) that the discussion accompanying Section 203 of the *Manual* suggests that the service-connection doctrine is well settled and highly predictable. In fact, the discussion and analysis accompanying the rule suggests nothing of the kind. For example, the analysis section (Pet. App. 49a) contains a warning that "[s]ince the constitutional limits of subject matter jurisdiction are matters of judicial interpretation, *specific rules are of limited value* and may unnecessarily restrict jurisdiction more than is constitutionally required" (emphasis added).

Experience shows that the service-connection issue has been an extraordinarily fertile source of appellate litigation. The Court of Military Appeals and the courts of military review have issued almost 400 published decisions dealing with the service-connection question, and many more unpublished ones.

[43] This expenditure of time is by no means atypical. The Air Force reports that out of nearly 1,000 cases prosecuted between August 1, 1984, and June 30, 1986, approximately 12% involved litigation of the issue of service connection.

impact of the charged offense on military interests. This cost is also significant because, as this Court has recognized, the time of key military personnel "may be better spent than in possibly protracted disputes over the imposition of discipline." *Middendorf*, 425 U.S. at 46 (footnote omitted).

F. Congress Should Be Free To Define The Proper Scope Of Court-Martial Jurisdiction

Petitioner (Br. 39) and Amicus Army Defense Appellate Division (Army Br. 14) argue that *O'Callahan* struck the proper balance between the interests of the armed forces and servicemembers and that this balance should not be disturbed. As we have explained, however, prior to *O'Callahan* this Court had long recognized that Article I and the Fifth Amendment struck the proper balance and that it did not need to be fine-tuned in every case. Because the improvements in the military justice system have largely eroded the rationale of *O'Callahan*, the only remaining question is whether the benefits of indictment by a grand jury and trial by a petit jury should trump Congress's authority to define court-martial jurisdiction. We submit that they should not.

1. *Indictment.* Most crimes committed off-post would be tried in state court, and a state defendant has no constitutional right to indictment by a grand jury. *Hurtado* v. *California*, 110 U.S. 516 (1884). In addition, most military offenses are tried by special courts-martial, which cannot impose a sentence of confinement in excess of six months. Art. 19, UCMJ, 10 U.S.C. 819.[44] Even in the federal system, a defendant has no right to an indictment for such crimes. Fed. R. Crim. P. 7(a); *Duke* v. *United States*, 301 U.S. 492 (1937). In cases tried by a

[44] During Fiscal Year 1984, for example, there were 10,087 special courts-martial, and only 2,592 general courts-martial. *Annual Report of the Code Committee on Military Justice* 27, 38, 49, 55 (Oct. 1, 1983 to Sept. 30, 1984).

general court-martial, where an indictment would be required in federal court, the adversarial Article 32 UCMJ investigation serves the grand jury's function of determining whether there is probable cause that a crime has been committed and protecting citizens against unfounded criminal prosecutions. See *Manual*, RCM 405(f) and (g) (rights of a defendant at an Art. 32 investigation); compare *Branzburg* v. *Hayes*, 408 U.S. 665, 686-687 (1972). This investigation extends to the servicemember protections not afforded to his civilian counterpart. *Gosa*, 413 U.S. at 681 n.6 (plurality opinion); see also *Mercer* v. *Dillon*, 19 C.M.A. 264, 266, 41 C.M.R. 264, 266 (1970); Moyer, *supra*, 22 Me. L. Rev. at 109-114; Swanson, *The Article 32 Right of An Accused to Pre-Trial Cross-Examination of the Witnesses Against Him "If They Are Available,"* 24 Air Force L. Rev. 246, 249, 253 (1984).[45]

2. *Petit jury.* As noted above, most military prosecutions cannot result in a term of imprisonment in excess of six months. Defendants in those cases would not be entitled to trial by jury in state or federal court. *Duncan* v. *Louisiana*, 391 U.S. 145, 158 (1968); *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966). In the remaining cases, a military defendant is tried by a court-martial panel "best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament." Art. 25, UCMJ, 10 U.S.C. 825; see also *Manual*, RCM 502(a) and 503(a).[46] *Duncan* v. *Louisiana* ad-

[45] Not only is the military accused given an adversarial hearing before an impartial investigating officer (Art. 32, UCMJ, 10 U.S.C. 832; *Manual*, RCM 405; *United States* v. *Collins*, 6 M.J. 256, 258-259 (C.M.A. 1979)) with the rights described in the *Manual*, but no charges may be sent to a general court-martial until the report of investigation has been reviewed by a judge advocate who must make a legal determination of probable cause (Art. 34, UCMJ, 10 U.S.C. 834; *Manual*, RCM 406 and 601).

[46] The panels can include members of similar rank, since enlisted defendants may at their request have enlisted members on their court. Art. 25(c), UCMJ, 10 U.S.C. 825(c); *Manual*, RCM 503(a)(2).

mitted that a "criminal process which was fair and equitable but used no juries is easy to imagine" (391 U.S. at 150 n.14), and it noted that the Court's decision to require the states to provide jury trials for serious crimes was not intended to "cast doubt on the integrity of every trial conducted without a jury" (*id.* at 157).[47] The plurality in *Gosa* v. *Mayden* also recognized that the court-martial system did not lack fundamental fairness, stating that such "proceedings are not basically unfair" (413 U.S. at 680-681) and that "[n]othing * * * in *O'Callahan* indicates that the major purpose of that decision was to remedy a defect in the truth-determining process" (*id.* at 682). In fact, the panel chosen for a court-martial is often "more nearly a jury of his peers than is a civilian panel in a State where the member may be involuntarily stationed." *Mercer* v. *Dillon*, 19 C.M.A. at 266, 41 C.M.R. at 266. In some cases, servicemembers "may well receive a more objective hearing" from a panel of military members than from a local jury of the civilian community. *Gosa*, 413 U.S. at 681 n.6 (plurality opinion).

History also supports the conclusion that court-martial proceedings are not fundamentally unfair because no jury is used. The Framers were well acquainted with the absence of juries in the military. Relying on British practice, Congress first established the present size of general courts-martial for the Navy in 1782 (22 J. Continental Cong. 325) and for the Army in 1786 (30 *id.* 145). Congress had a rational basis rooted in two centuries of experience for continuing the structure of courts-martial when it enacted the UCMJ in 1950, and Congress has refused to depart from that path ever since.[48] This history is powerful evidence that Congress

[47] This was a principal reason that the right to a jury trial was not applied retroactively. *DeStefano* v. *Woods*, 392 U.S. 631, 633-634 (1968).

[48] Since the enactment of the UCMJ in 1950, Congress has passed 23 different acts amending various sections of the UCMJ, but it has never seen fit to alter the membership of courts-martial. The most recent of these statutes was the Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, 99 Stat. 678 *et seq.* The citations to the other 22 statutes are collected in our brief in opposition (at 12-13 n.10) in *Garwood* v. *United States*, cert. denied, No. 85-175 (Dec. 2, 1985). We have provided counsel for petitioner with a copy of that brief.

has found the court-martial system to be a "fair and equitable" non-jury system of the kind the Court described in *Duncan*.

In sum, since the decision in *O'Callahan* there have been sweeping changes in the military justice system, and during the same period this Court has repeatedly acknowledged the appropriateness of deferring to Congress on matters of military discipline and effectiveness. These developments call for *O'Callahan* to be reconsidered. No longer is there a basis for a judicial limitation on the will of Congress that all violations of the UCMJ by servicemembers should be tried by court-martial. Eliminating that restriction will also end the confusion resulting from the unstructured question of service-connection. For the reasons set forth above, the Court should reject the service-connection requirement created in *O'Callahan* and should return to Congress the authority to define court-martial jurisdiction.

CONCLUSION

The judgment of the Court of Military Appeals should be affirmed.

Respectfully submitted.

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